



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 23, 1998

Ms. Jennifer D. Soldano
Associate General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Building
125 East 11th Street
Austin, Texas 78701-2483

OR98-1029

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 113468.

The Texas Department of Transportation (the "department") received several requests from the same individual for various categories of information "in regard to all aspects relating to the Video Imaging Vehicle Detection System (VIVDS)." In response to the request, you submitted to this office for review a representative sample of the records which you assert are responsive.¹ You explain that the department is "seeking trade secret exception because these documents contain legitimate, valuable, and protectable interest . . . excepted under the provisions of Section 552.110" of the Government Code. We have considered the exception you claim and have reviewed the submitted records

Pursuant to section 552.305, we notified Active Traffic Management, Inc. ("Active"), Mica Corporation ("Mica"), Econolite Control Products, Inc. ("Econolite"), Paradigm Traffic Systems, Inc. ("Paradigm"), Peek Traffic Systems, Inc. ("Peek"), and Visitech, Inc., whose proprietary interests may be implicated by this request for information, and provided them

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

with an opportunity to claim that the information at issue is excepted from disclosure. See Gov't Code § 552.305; Open Records Decision No. 542 (1990). The notification states that if the company does not respond within 14 days of receipt, this office will assume that the company has no privacy or property interest in the requested information. However, only Econolite responded to our notification. Econolite responded by arguing that most of the requested information is excepted from disclosure under section 552.110 of the Government Code as "proprietary information."² Since Active, Mica, Paradigm, Peek, and Visitech did not respond to our notification, we assume these companies have no property or privacy interest in the information.³ Therefore, we have no basis to conclude the information about these other companies is excepted from required public disclosure, and conclude it must be released. Consequently, we will only consider whether the requested information relating to Econolite is excepted from disclosure under section 552.110.

Section 552.110 of the Government Code excepts from disclosure:

A trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. . . .

Commercial or financial information may be excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 of the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. Consequently, if a governmental body or other entity can meet the test established in *National Parks*, the information may be withheld from disclosure.

To be held confidential under *National Parks*, information must be commercial or financial, obtained from a person, and privileged or confidential. *National Parks*, 498 F.2d at 766. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. Moreover, "[t]o prove substantial competitive harm, the party seeking to prevent

²We note that information is not confidential under the Open Records Act simply because the party submitting it to a governmental body anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987).

³In fact, in subsequent correspondence to this office, the department has informed our office that Paradigm and Peek "do not wish to exercise the exception to this request."

disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure.” *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted). *See* Open Records Decision No. 639 (1996) at 4.

Econolite’s chief executive officer has submitted a brief “urg[ing] the Attorney General to substantially restrict the Econolite/ISS data.”⁴ Specifically, Econolite objects to the release of the following:

- (1) Any and all data, video tape, and test results on VIVDS installations, where such data was accumulated or tests were conducted by Econolite, Image Sensing, Inc. (‘ISS’) and/or Texas Transportation Institute (‘TTI’); and,
- (2) Any and all performance reports or special documents prepared by Econolite and /or ISS and labeled ‘Competition Sensitive. Do Not Copy or Circulate.’

We conclude that Econolite has provided specific factual or evidentiary material for this office to determine that release of portions of the requested information will cause substantial harm to their competitive position. Thus, we conclude that Econolite has met its burden under section 552.110 in order to withhold portions of the requested records. We have tagged and marked the submissions that the department must withhold pursuant to section 552.110. The department must therefore withhold from disclosure the specified portions of the requested information regarding the Econolite proposal, and release the remaining submitted information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Sam Haddad", written over a horizontal line.

Sam Haddad
Assistant Attorney General
Open Records Division

⁴We also note that although Econolite asserts that “the request from Schaadco is for an improper purpose,” However, we note that the legislature has prohibited governmental bodies from inquiring into the motives of a requestor in seeking information. Gov’t Code § 552.222(b).

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Ref: ID# 113468

Enclosures: Marked documents

cc: Mr. William C. Schaad
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